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Gerald M. Stevens
University of Michigan Law School

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WATERS AND WATERCOURSES — EXTENT OF RIPARIAN LAND — COMPENSATION ON CONDEMNATION — Plaintiff owned a ranch comprising over 45,000 acres and fronting for six miles on the North Platte river. One and a half miles of the river frontage were taken by eminent domain proceedings for a dam and reservoir. Plaintiff claimed the value of his whole ranch was reduced by the loss of water rights, by the destruction of sheltering trees and brush, by the creation of a potential hazard to cattle, and by the threat of floods from breaking dam or dikes. He recovered damages on that basis. Reversing the judgment, the court *held*, riparian rights attached only to those sections (by the government plat) bordering on the river. There should be no recovery for damages to any other part of the ranch. *McGinley v. Platte Valley Power & Irrigation District*, (Neb. 1937) 271 N. W. 864.

The result is in sharp contrast with the usual rule of damages in eminent domain cases. It is undisputed that where only part of a tract is taken the owner should recover the value of the land taken and the reduction in the value¹ of the remaining part.² How much land is to be considered a single tract depends upon the nature of its use. Was it used as a unit?³ The decision here seems to assume that non-riparian⁴ land cannot be benefited (in contemplation of law) by access to the stream or by proximity to riparian land. The latter proposition is clearly untrue. In the present case, for example, the existence of trees and brush on the condemned land was claimed to have added value to other ranch lands used in connection with it. The rules of water rights would seem to be irrelevant in determining whether such benefit was actually conferred.

¹ Factors to be considered in determining the value of land are those which would influence an ordinary purchaser in setting his price. See 35 MICH. L. REV. 495 (1937). *McCandless v. United States*, 298 U. S. 342, 56 S. Ct. 764 (1936) (there noted), held it was proper to consider evidence that water for irrigation could have been brought from another tract ten miles away. The questions considered herein were not raised. Objections could have been answered by differences in the local (Hawaiian) water law. See *Wong Leong v. Irwin*, 10 Haw. 265 (1896); *Territory v. Gay*, 31 Haw. 376 at 383 (1930).

² 2 LEWIS, EMINENT DOMAIN, 3d ed., § 686 (1909); MCCORMICK, DAMAGES, § 130 (1935).

³ 2 LEWIS, EMINENT DOMAIN, 3d ed., § 698 (1909).

⁴ "Riparian" rights connotes common-law doctrine. As to how far they are in effect in the western states, see 1 WIEL, WATER RIGHTS IN WESTERN STATES, 3d ed., §§ 111-142 (1911); 1 KINNEY, IRRIGATION, 2d ed., §§ 590-593 (1912).

The first proposition above is also subject to criticism, though probably not as applied to these particular facts. If the stream were navigable, non-riparian land with access to it might be benefited by convenience of transportation facilities. And although any perceptible diversion of water to non-riparian land or for non-riparian purposes⁵ is usually actionable,⁶ a use within the maxim *de minimis* gives no cause of action.⁷ Such a slight use might conceivably be of substantial value. Perhaps from the same principle or from an enlargement of it,⁸ it has been suggested that even a substantial use on non-riparian land is not necessarily unreasonable or wrongful if no actual injury is caused to lower proprietors.⁹ But if the privilege of use on non-riparian land is denied and a substantial use of water is involved, it becomes important to determine the extent of riparian land. For only land on which riparian rights may be exercised is damaged by interference with those rights. Two, or possibly three, conflicting rules have been used. These differ in their attitude toward the nature of water rights¹⁰ and the effect of conveyances of nearby land. Suppose *A* owns land admittedly riparian and conveys to *B* a part which has no access to the stream. Then *B* ordinarily has no riparian rights. But if *B* reconveys to *A*, the whole tract is again riparian under the "unity of title" test.¹¹ By the

⁵ *McCord v. Big Brother Movement*, 120 N. J. Eq. 446, 185 A. 480 (1936) (water used on riparian land for swimming pool for summer camp).

⁶ *McCartney v. Londonderry & Lough Swilly Ry.*, [1904] A. C. 301; *Exton v. Glen Gardner Water Co.*, 3 N. J. Misc. 613, 129 A. 255 (1925); *McCord v. Big Brother Movement*, 120 N. J. Eq. 446, 185 A. 480 (1936); *Hendrix v. Roberts Marble Co.*, 175 Ga. 389, 165 S. E. 223 (1932). But the right to divert to non-riparian land may be acquired by prescription. 2 FARNHAM, WATERS, § 535 (1904).

⁷ See *McCord v. Big Brother Movement*, 120 N. J. Eq. 446, 185 A. 480 (1936).

⁸ An attempt to reconcile the cases is found in *Town of Gordonsville v. Zinn*, 129 Va. 542, 106 S. E. 508 (1921); 2 FARNHAM, WATERS, § 497 (1904), treated the rules as co-existing and consistent. Cf. 27 R. C. L. 1128 (1920) (considered conflicting), and 67 C. J. 803 (1934) (considered consistent).

⁹ *Gillis v. Chase*, 67 N. H. 161, 31 A. 18 (1895); *Lawrie v. Silsby*, 76 Vt. 240, 56 A. 1106 (1904); *Harris v. Norfolk & W. Ry.*, 153 N. C. 542, 69 S. E. 623 (1910). See also *Jones v. Conn*, 39 Ore. 30, 64 P. 855 (1901); *Stratton v. Mt. Hermon Boys' School*, 216 Mass. 83, 103 N. E. 87 (1913); *Town of Gordonsville v. Zinn*, 129 Va. 542, 106 S. E. 508 (1921). See 12 MICH. L. REV. 304 (1914) advocating adoption of this rule. 4 TEX. L. REV. 231 (1926).

¹⁰ Riparian rights are said to be an "incident" or "parcel of the land." See 7 CAL. L. REV. 286 (1919).

¹¹ Under either rule riparian land is limited to that within the watershed of the stream. *Bathgate v. Irvine*, 126 Cal. 135, 58 P. 442 (1899); *Anaheim Union Water Co. v. Fuller*, 150 Cal. 327, 88 P. 978 (1907); *Town of Gordonsville v. Zinn*, 129 Va. 542, 106 S. E. 508 (1921).

Under the "unity of title" rule, adjoining land conveyed to *A* would become riparian though it never had been so before. This has been assumed to be the usual rule of the common law. 1 KINNEY, IRRIGATION, 2d ed., § 465 (1912). But apparently the first case so holding was *Jones v. Conn*, 39 Ore. 30, 64 P. 855 (1901), citing *Kinney*. Approved, *Clark v. Allaman*, 71 Kan. 206 at 245, 80 P. 571 (1905). See 31 MICH. L. REV. 1183 (1933).

"source of title" test, the reconveyed parcel remains non-riparian.¹² An important corollary of the latter rule is that riparian rights will not usually extend beyond the area which could originally be acquired by a single grant from the government. It has been further suggested that riparian incidents should attach only to the smallest subdivisions of the government survey, i.e., to forty acres.¹³ In a leading case the Nebraska court approved the "source of title" test of the California decisions and expounded the government survey test.¹⁴ The present case does not clearly follow the one or the other. It is not the pure "source of title" test, for no inquiry into the actual history of the title is to be made. It is not the government survey test, for riparian rights attach to a whole section "because . . . it has been possible to acquire a section of land from the government."¹⁵ But in such circumstances as these either rule seems too narrow and quite unrealistic. In effect it is held that ranchers may not water at any stream, however large, more cattle than are maintained within a mile of its banks; that a perceptible diminution of the flow caused by violating that rule will, according to many cases (see *supra*) be actionable. If the decision were given that practical effect, the use of a natural resource would be absurdly limited and much land rendered almost worthless.

Gerald M. Stevens

¹² *Anaheim Union Water Co. v. Fuller*, 150 Cal. 327, 88 P. 978 (1907); *Yearsley v. Cater*, 149 Wash. 285, 270 P. 804 (1928), approved *Watkins Land Co. v. Clements*, 98 Tex. 578, 86 S. W. 733 (1905); 27 MICH. L. REV. 479 (1929); 31 MICH. L. REV. 1183 (1933).

But in California it was held that riparian rights may be expressly reserved to a tract without access. *Miller & Lux, Inc. v. James Co.*, 179 Cal. 689, 178 P. 716 (1919). Criticized, 7 CAL. L. REV. 286 (1919). See 13 COL. L. REV. 267 (1913).

¹³ 1 KINNEY, IRRIGATION, 2d ed., § 464 (1912). *Crawford Co. v. Hathaway*, 67 Neb. 325 at 354, 93 N. W. 781 (1903). Other cases cited by Kinney merely state the corollary of the "source of title" test.

¹⁴ *Crawford Co. v. Hathaway*, 67 Neb. 325 at 354, 93 N. W. 781 (1903).

¹⁵ *McGinley v. Platte Valley Power & Irrigation Dist.*, (Neb. 1937) 271 N. W. 864 at 867.